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No. 109

In the Supreme Court of the United States

OCTOBER TERM, 1950

MARTIN L. WHELCHEL, PETITIONER

v.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION, TEXARKANA, TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 62) is reported at 176 F. 2d 260, and its opinion denying rehearing (R. 72) is reported at 178 F. 2d 760. An informal oral opinion of the District Court, not reported, appears in the record at page 48.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1949 (R. 66). The order of the

Court of Appeals denying rehearing was entered on December 28, 1949 (R. 72). The petition for a writ of certiorari was filed March 22, 1950, and was granted, with leave to proceed in forma pauperis, on June 5, 1950 (R. 73). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the petitioner is entitled to raise the question of the interpretation or constitutionality of Article 53 of the Articles of War, which provides that actions on applications to the Judge Advocate General for new trial shall be binding on the court, where the civil courts had decided the case on the merits of his petition for a writ of habeas corpus before the petition for a new trial before the military authorities was acted upon.

2. Whether a petition for habeas corpus was properly denied in the light of petitioner's claim that he was insane both at the time of the offenses and at the time of trial.

3. Whether the court-martial proceedings denied petitioner due process in the treatment of the insanity issue or by reason of the failure to include enlisted men on the court.

4. Whether the court erred in refusing a rehearing on petitioner's claim that the court-martial was not properly constituted because of the absence of a law member from the Judge Advocate General's Department.

STATUTES INVOLVED

The relevant provisions of the Articles of War and of the Manual for Courts-Martial are set forth in the Appendix to this brief at pages 32-40.

STATEMENT

On March 16, 1945, petitioner, then a private in the Army of the United States on duty in Europe, was charged with rape of a German woman, in violation of Article 92 of the Articles of War,[1] 10 U.S.C. (1946 ed.) 1564, and assault with intent to commit rape upon another woman, in violation of AW 93, 10 U.S.C. (1946 ed.) 1565 (CM R. 26-28).[2] The charges were referred to an investigating officer in accordance with AW 70, 10 U.S.C. (1946 ed.) 1542 (CM R. 31). On March 24, 1945, the investigating officer submitted a written report which included the following statement, "I have no reasonable ground for belief that the accused is, or was, at the time of any offense charged, mentally defective, deranged, or abnormal." (R. 49). On March 25, the Division Neuropsychiatrist of the 89th Infantry Division, to which the petitioner was attached, made a thorough psychiatric examination of petitioner and prepared a written report in which he concluded: "He must be considered legally sane and his personality is in keeping with

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[1] Throughout this brief the various Articles of War will be designated as AW——.

[2] The designation "CM R." will be used herein to refer to petitioner's court-martial record which was received in evidence before the district court (R. 2) and is on file in this Court as an original exhibit.

that of a borderline mental defective with psychopathic traits". (R. 51) Because of the importance of this report to the case, it is reproduced in full as an appendix to this brief at pages 40-43. Following a review of the charges, the expected testimony as shown by the pre-trial investigation, and the psychiatric report, the Division Staff Judge Advocate recommended a general court-martial trial, stating, " * * * there is no reason to believe that the accused may be mentally defective or deranged, either temporarily or permanently." (R. 52)

The court-martial, on April 10, 1945, tried petitioner and found him guilty as charged (CM R. 125). He was sentenced to be hanged (CM R. 128). Neither at the pre-trial investigation nor at the trial itself was the defense of insanity raised. An April 16, the Division Staff Judge Advocate reviewed, and recommended approval of, the record of trial (CM R. 14-20), and on April 19, the Commanding General of the Division, as the reviewing authority, approved the sentence and forwarded the record for further appellate review. (CM R. 129)

Thereafter, on April 25, 1945, fifteen days after the trial, petitioner's trial counsel wrote to the Commanding General of the 89th Division stating that he had received information that petitioner's offenses might have been committed while he was in an "epileptic episode", and requesting "that the case be reopened and that Private Whelchel be admitted to a hospital for a thorough neuropsychi-

atric examination." (R. 22) There was attached to this letter another letter by a medical officer,[3] a statement by petitioner's immediate commanding officer,[4] a statement by a Sergeant who had observed the petitioner,[5] and a statement of concurrence in the request by five of the six members of the court-martial (CM R. 135). The letter and its enclosures were forwarded to the Headquarters of the European Theater of Operations, which by this

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[3] Captain Pellettieri's statement, dated April 23, 1945 (which is set forth in full in the Appendix at pp. 43-45), was to the effect that petitioner's "entire behavior on the night of the 14th of March, 1945 [date of the offenses] was that of an insane or drunken individual;" that "he either was so drunk he did not know what he was doing or that he had an epileptic episode"; that his lack of concern about his crime and his firm conviction of his own innocence "were the result of his amnesia of the whole incident"; that in one instance he fired a machine gun in a rear area, but said he did not know why he did it; that at another time, he asked his platoon commander to reduce him from Technician 4th Grade to Private because he was not sure of himself; and that "putting these factors together plus the unbelievable evidence that he was sober cause me to conclude that the boy is not normal mentally and as such should be given the proper consideration" (R. 18).

[4] Lieutenant Graham's statement, dated April 24, 1945, stated that on or about February 21, 1945, petitioner, apparently intoxicated, asked to be reduced from Technician 4th Grade to Private; that he told petitioner to go to bed and think it over, but instead petitioner fought with two or three of his best friends; that petitioner fired a machine gun over the head of one of the men; that the next day petitioner was reduced to Private; and that when questioned about the incident of the day before he had no knowledge of it (CM R. 132).

[5] Sergeant Goolsby's statement, dated April 24, 1945, was to effect that on or about February 21, 1945, petitioner, after drinking, became very quarrelsome with his best friends; that he shot a machine gun over the head of his assistant driver; and that after this he "appeared to crack up mentally" (R. 23).

time had the case before it for confirmation, with the notation that, "The attached request * * * indicate[s] that there is some question of this man's sanity. He was, however, examined by the Division Neuropsychiatrist before case was referred for trial and found legally sane." (R. 59)

Subsequent to the receipt of the record and the request for the further examination, the Staff Judge Advocate of the European Theater of Operations reviewed the record (R. 53-58) and on his recommendation General Eisenhower confirmed the sentence but commuted it to life imprisonment. (CM R. 130) Still later, on August 24, 1945, the Board of Review in the branch office of the Judge Advocate General, European Theater of Operations, examined the entire record and determined that it was legally sufficient to support the findings of guilty and a sentence. (CM R. 3-8) The sentence was then approved by the Assistant Judge Advocate General. (CM R. 1) On July 16, 1947, by direction of the President, petitioner's period of confinement was reduced to 21 years, and on September 15, 1949, was further reduced to 18 years.

While the petitioner was serving his sentence in the Federal Correctional Institution in Texarkana, Texas, he instituted the present habeas corpus proceeding in the District Court for the Eastern District of Texas, challenging the validity of his conviction on the ground that he was mentally incapacitated at the time of the alleged offense and

at the trial. An order to show cause was issued and the court received evidence and argument on February 18, 1949.

At this hearing the entire court-martial record was introduced in evidence. Petitioner produced a deposition by Captain (now Doctor) Pellettieri, the medical officer whose statement had been brought to the attention of defense counsel immediately after the court-martial proceeding. In his deposition Dr. Pellettieri stated that he had not made a psychiatric examination of the petitioner nor any general physical examination. He stated, "I asked him a few questions, but his answers were vague and he was negativistic". (R. 17) He also testified that in his opinion petitioner was not mentally responsible for his acts at the time of the offenses in question (R. 19, 20), or at the time of his trial (R. 19), and in response to a question as to whether petitioner's mental condition precluded him from making a valid defense, the Doctor answered that petitioner "had a complete blackout" and "did not remember" committing the offenses (R. 20). It was admitted that Dr. Pellettieri was "just a general medical practitioner" and not a psychiatrist. (R. 16)

Petitioner also called as a witness his Commanding Officer, who testified concerning the incidents described in his earlier statement (see footnote 4, supra, p. 5). He also stated that he had told petitioner at the time of these incidents that he thought he was crazy rather than drunk (R. 26-

28), and that petitioner showed no emotion when his death sentence was announced at the trial. (R. 28-29) In addition, the court permitted him to testify that in his opinion petitioner was not mentally responsible at the time of the trial. (R. 29) The witness, however, had made no such representation to the court-martial at the time of the trial (R. 29), at which he was a character witness for the petitioner. (R. 29) He also stated that he was the one who had signed the charge sheets containing the accusations against petitioner. (R. 33)

A friend of petitioner's grandfather and father testified that about three years before the grandfather's death, at the age of 80, he was considered insane by the community in which he lived (R. 35) and that petitioner's father got into fights with neighbors on several occasions and later said that he did not remember the incidents. (R. 35-37) This witness, was also permitted, over objection, to give hearsay testimony of statements by a deceased doctor who treated petitioner's father when he took poison, to the effect that it was better for him to die than to get well, because "he is crazy and he would kill someone else." (R. 37)

The petitioner himself testified that he had no memory of the incidents preceding the offenses in question; that he had no recollection of the events on the night of the offenses; that he had no recollection about the court-martial trial; and that he first came to himself in the death house in France.

(R. 39-44) This testimony is inconsistent with the written statement of petitioner given the investigating officer in which petitioner claimed that on the night of the offenses he had played cards, drunk some wine and gone to bed (CM R. 72).

The District Court denied the habeas corpus petition (R. 59-60) and the Court of Appeals for the Fifth Circuit affirmed the order of denial. (R. 62-65) Petitioner then filed a motion for rehearing in the Court of Appeals, and, while this motion was pending, he applied to the Judge Advocate General for a new trial pursuant to AW 53 of the amended Articles of War which became effective on February 1, 1949. (10 U.S.C., Supp. III, 1525) This application was denied by the Judge Advocate General, and the Court of Appeals thereafter overruled the motion for rehearing. (R. 72)

SUMMARY OF ARGUMENT

This case does not involve the question whether resort to a petition for a new trial before the military authorities under AW 53 is a prerequisite for jurisdiction in a habeas corpus proceeding. A petition for a new trial has been filed and denied by the Judge Advocate General. Nor does the case raise any question as to the finality of the action by the Judge Advocate General in denying a new trial or the constitutionality of the provision that action on a petition for a new trial shall be binding on the courts. The court below decided the case on its merits, and it was not until the peti-

tion for rehearing before it was filed that the denial of the application under Article 53 was presented to it. Therefore, regardless of the language in the court's opinion in denying the motion for rehearing, the fact remains that it had already considered the case on its merits.

What is before this Court is the allegation that petitioner was insane both at the time of the offense and at the time of trial. This alleged insanity, it is argued, should have led to a grant of the habeas corpus petition on two grounds: First, it is argued that it prevented the petitioner from receiving a fair trial under the reasoning of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458; and Second, the treatment of the issue of insanity by the court-martial and the reviewing and confirming tribunals was not in accord with the Manual for Courts-Martial then in effect. This all assumes that a real showing of insanity was made to the District Court. That is contrary to the fact. The evidence before the court, as before the court-martial, indicated that petitioner was drunk (but not so drunk as not to be conscious of his acts), not insane. The question of his sanity was raised by his defense counsel, supported by a medical officer who was not a psychiatrist, after he had been sentenced to be hanged. It was apparently based on compassion for his predicament rather than on fact. On the facts of this case this Court should never come to the legal issues of whether insanity is a basis for habeas corpus, or whether the Manual

for Courts-Martial was followed, or whether, if it were not, failure to follow it was jurisdictional.

However, even assuming petitioner's view of the facts, it is apparent that his legal points are without validity. Insanity is a question of fact for the trial tribunal, frequently raised under the plea of not guilty. It is not a jurisdictional fact which deprives the court of power to try the issue. The verdict in courts-martial, as in civil courts, is "not guilty" if, on trying the issue, it is found that the defendant was insane. As in other non-jurisdictional issues, it is not the function of the habeas corpus court to review the court-martial proceedings for error; that is for the appellate military tribunal.

In so far as compliance with the applicable military procedures is concerned, it is equally clear that the pre-trial, the trial, and the reviewing and confirming procedures were strictly followed. No doubt was cast on the original psychiatric examination and no need for a new one was demonstrated.

The contention that the court was improperly constituted because it was comprised entirely of officers is without validity. Courts-martial both before and after the Revolution had always been so constituted and the petitioner had no rights under the Constitution to a different method of military trial than the ordinary method then in effect.

Finally, petitioner at the late date of his application for a rehearing before the Court of Appeals attacked the court-martial because of the absence

of a member of the Judge Advocate General's Department as a law member. He does not even allege that such a person was available, and the record itself indicates that in fact no such member was available. There is therefore, no ground for reversal on this basis.

ARGUMENT

I

Article 53 of the Articles of War Providing That Action on an Application for a New Trial Shall be Binding on the Courts Did Not Affect Petitioner's Rights in the Present Case.

At the time this Court granted certiorari in this case it also granted certiorari in *Gusik* v. *Schilder*, No. 110. In both petitions it was argued that AW 53 (10 U.S.C., Supp. III, 1525) is unconstitutional as a suspension of the right of habeas corpus.

The revised Articles of War, providing, among other things, a statutory proceeding for new trials, became effective on February 1, 1949. (Sec. 244, Act of June 24, 1948, Ch. 625, Title II, 62 Stat. 642.) The procedure was provided by AW 53 set forth in the appendix at page 34. In so far as it is involved in this case, the significant language is the last clause providing:

> . . . orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon the departments, courts, agencies, and officers of the United States.

Since the petition for habeas corpus was filed on January 13, 1949, prior to the effective date of the revised Articles of War, the new trial procedure before the military tribunal could not have been resorted to before the time of filing. However, AW 53 did become effective before completion of the case, and the issue was raised in the Court of Appeals whether compliance with the new trial procedure was a prerequisite to habeas corpus. The Court of Appeals, as a separate ground for affirmation, stated in its original opinion that it believed the application for a new trial should be filed before action by the civil courts (R. 65). However, a petition for rehearing before the Court of Appeals was filed and the Court delayed entering an order to give petitioner an opportunity to apply to the Judge Advocate General under AW 53. (R. 72) Petitioner did so apply and his application for a new trial was denied by the Judge Advocate General. (R. 69)

Thus, as this case comes before this Court, the issue of whether a petitioner must apply for a new trial under AW 53 before applying for habeas corpus has been eliminated.

Petitioner, however, attempts to bring AW 53 back into the case by asserting that the provision making orders of the Judge Advocate General "binding on the courts" is a *pro tanto* suspension of the writ of habeas corpus in violation of Section 9 of Article I of the Constitution.

This issue is more fully treated at pp. 12-18 of our brief in *Gusik* v. *Schilder,* No. 110, which is being filed simultaneously with this brief. Our position is that the finality provision of AW 53 does no more than codify the existing rule that civil courts will not review or correct court-martial proceedings except on jurisdictional issues. If we are correct in this interpretation, the civil courts are in no wise deprived of their jurisdiction and no basis exists for asserting that the right to habeas corpus has been curtailed.

However, even if it be assumed that AW 53 does attempt to prevent review of jurisdictional questions, and if it be further assumed that it is therefore unconstitutional, petitioner in this case is not entitled to complain. The District Court granted him a full hearing on the merits and the Court of Appeals upheld the findings of the District Court referring to the necessity of resorting to AW 53 only as an alternative ground for its decision (R. 65). It was not until the time of filing of the amended petition for rehearing addressed to the Court of Appeals that any question of the finality of orders under AW 53 became involved. Since the only new ground asserted for a rehearing was, on the facts of this case, a non-jurisdictional one (involving the absence of a member of the Judge Advocate General's Department as law member of the Court), it seems clear that the Court could not properly have reviewed the exercise of discretion by the appointing authority

on this matter, and that therefore the rehearing would have had to be denied wholly apart from the provision of AW 53 (see pp. 29-31, *infra*).

II

Petitioner Has Presented No Facts as to His Sanity Which Would Warrant the District Court in Granting Habeas Corpus.

In Point III, *infra*, pp. 21-25, we argue that sanity is not a jurisdictional issue which can be reviewed on habeas corpus. But assuming the contrary, the matter was fully tried in the District Court and petitioner's contention rejected. The Court of Appeals affirmed this finding (R. 65). The decision, we submit, was clearly correct.[6]

Petitioner was granted great latitude in the District Court to submit all available evidence on his sanity. There was introduced the complete record before the military authorities as well as additional testimony and depositions. But petitioner utterly failed to introduce any convincing evidence that he was insane either at the time of the offense or at the time of the trial.

The ordinary test of criminal responsibility is whether the defendant was able to tell right from wrong. *Fisher* v. *United States*, 328 U.S. 463, 466; *Davis* v. *United States*, 160 U.S. 469, 485; *Hotema* v. *United States*, 186 U.S. 413; *Holloway* v. *United States*, 148 F. 2d 665 (C.A. D.C.), cer-

[6] Uncer Rule 52 (a) of the Rules of Civil Procedure, the District Court's findings must be affirmed "unless clearly erroneous."

tiorari denied, 334 U.S. 852. Under the Manual for Courts-Martial, 1928, the same test is applicable to military trials. Paragraph 78a of the Manual provides:

> * * * A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right.

The test for insanity at the time of trial is whether he could comprehend his own condition with reference to the accusation pending against him and could rationally conduct his defense. *Ashley* v. *Pescor*, 147 F. 2d 318 (C.A. 8); *Moss* v. *Hunter*, 167 F. 2d 683 (C.A. 10). Again the test as applied to military trials is the same. Paragraph 63 of the Manual for Courts-Martial (1928) phrases the test as whether the accused has the mental capacity "to understand the nature of the proceedings" and "intelligently to conduct or cooperate in his defense."

In a habeas corpus proceeding, the burden is on the petitioner to prove his allegations by a preponderance of the evidence. See *Hawk* v. *Olson*, 326 U.S. 271, 279; *Walker* v. *Johnston*, 312 U.S. 275, 279; *Johnson* v. *Zerbst*, 304 U.S. 458, 468; *Brewer* v. *Hunter*, 163 F. 2d 341, 343 (C.A. 10); *Forthoffer* v. *Swope*, 103 F. 2d 707, 710 (C.A. 9). The evidence before the District Court in this case

failed to convince it that petitioner had met this burden. A review of the facts will show that this Court should sustain that finding.

The most important item of evidence was the report of the Division Neuropsychiatrist who examined the petitioner on March 25, nine days after the offense. The thorough nature of this examination appears from the report of the doctor, which is printed in full in the Appendix to this brief at pp: 40-43, *infra*. With respect to petitioner's awareness of his position, the report states, "He is oriented for time, place, and person and both remote and recent memory are adequate." (R. 51) In summary and conclusion, the report states:

> Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information. He must be considered legally sane and his personality is in keeping with that of a borderline mental defective with psychopathic traits. [R. 51]

This report reflects the only psychiatric examination of the petitioner which has been made, so far as the record shows, up to the present time. No question has been raised as to the adequacy of the examination or the qualifications of the doctor. The report is attacked solely on the ground that the doctor's assumption that there was no history of insanity in petitioner's background was erroneous. However, the evidence on this came from lay wit-

nesses and is inherently so weak as to cast no doubt on the report.[7]

Since, under Paragraphs 78a and 63 of the *Manual for Courts-Martial,* insanity was a defense, part of the pre-trial procedures involved investigation of the sanity of the accused. The investigator in this case reported on March 24, 1945, "I have no reasonable ground for belief that the accused is, or was, at the time of any offense charged, mentally defective, deranged, or abnormal" (R. 49).

Another pre-trial step was a review of the charges and investigation by the Staff Judge Advocate. His report states, "* * * * there is no reason to believe that the accused may be mentally defective or deranged, either temporarily or permanently" (R. 52).

The petitioner was of course present at the court-martial proceeding but did not testify.[8] Three of

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[7] A Carl Bradley testified that for three years before the death of petitioner's grandfather at the age of eighty, he was considered insane by the community in which he lived (R. 35). Bradley also testified that petitioner's father was "more or less irritable and seemed to be hard to get along with," that he had fights and did not remember them thereafter, and that a doctor who attended him when he had taken poison said, "It is better that he die than to get well. * * * If he was to get well, * * * he is crazy and he would kill some one else" (R. 36-37). Counsel stipulated that a certain T. J. Barnwell would give similar testimony (R. 38).

[8] Petitioner's failure to testify does not imply a disinterestedness in the outcome of the trial. It should be noted that he had tried to establish an alibi in his sworn statement to the investigating officer (CM R. 72), which had been directly contradicted by two of his comrades (CM R. 64, CM R. 71). He may well have felt that with his alibi destroyed, he would not help his own case by taking the stand.

the persons who later raised question as to his sanity were also present; namely, his defense counsel, his commanding officer, and the doctor who had examined the prosecutrixes. None of these officers raised any question as to his sanity. There was, however, a substantial amount of evifence that petitioner had been drinking heavily and was drunk at the time of the offenses. (CM R. 121, 117, 114).

After the trial was completed, and indeed after its approval by the reviewing authority, petitioner's defense counsel addressed a communication to the commanding general saying that Captain Pellettieri, a Medical Corps Surgeon, had brought to his attention the fact that petitioner might be a victim of epilepsy, and that the crime might have been committed during an epileptic episode, a situation which would have rendered him irresponsible for his actions (R. 22). He stated that petitioner was unconcerned before the trial, and not affected by his sentence when it was announced. On the basis of these facts, he requested that the case be reopened and that the petitioner be admitted to a hospital for a thorough neuropsychiatric examination. He made no mention of the previous examination (R. 22). The statement that petitioner might be a victim of epilepsy is not supported by Captain Pellettieri's deposition, and his original report carries a strong implication that petitioner was intoxicated at the time of the offense (R. 18). There were also at-

tached to defense counsel's letter two letters from the petitioner's commanding officer and a sergeant relating the circumstances of some disturbances in which petitioner had been involved in the preceding February. The request also carried endorsements by five members of the court-martial, concurring in the request.

In addition to the court-martial record, there was also before the District Court a deposition by Doctor Pellettieri, who had made no additional examination of the petitioner. In fact, this deposition detracts from the previous report by making it clear that the doctor had not made a psychiatric examination at any time (R. 17). At the trial in the District Court, petitioner's commanding officer also testified and was permitted to state that he did not think petitioner was mentally responsible. (R. 29).

The petitioner himself also testified before the District Court. He there contradicted a statement which he had made to the investigating officer that he had played cards, had some drinks, and went to bed on the night of the offense. (CM R. 72). He testified that he had no memory of the events which had transpired since before the time of the offense until he found himself in the death house after the trial. (R. 40-44).

The trial court heard all of this evidence and stated, " * * * these opinions are just the flimsiest things I ever heard" (R. 48). The court decided the case on all of the evidence before it and con-

cluded that the petitioner was not insane. It is submitted that his findings are amply supported by the record. Certainly there was no evidence, other than petitioner's statements, that the alleged insanity, even if it existed, was of such a nature as to have rendered petitioner unable to distinguish right from wrong or unable to comprehend his condition with reference to the accusations against him, or unable to assist in his defense. In fact, the facility with which petitioner presented an alibi indicated that he was fully conscious of his wrong doing, aware of the nature of the accusation, and, perhaps misguidedly, able to devise a defense.

III

The Issue of Sanity Was Not a Jurisdictional Matter in the Court-Martial and is Therefore Not Subject to Review on Habeas Corpus.

It is well settled that on a petition for habeas corpus a court is limited to testing the jurisdiction of the military court; it may not exercise supervisory or reviewing power over the proceedings. *Hiatt* v. *Brown*, 339 U. S. 103, 111; *Humphrey* v. *Smith*, 336 U.S. 695; *In re Yamashita*, 327 U.S. 1, 8-9.

The question therefore, is whether the issue of sanity, either at the time of the offenses or at the time of trial, was one of jurisdiction and therefore subject to collateral attack in a habeas corpus proceeding. Although this Court has not passed upon

this question directly in a habeas corpus proceeding to attack a conviction, it has considered the matter with respect to extradition. In two important cases it has held that the issue of insanity is one for determination by the trial court.

In *Drew* v. *Thaw*, 235 U.S. 432, petitioner sought habeas corpus to prevent his extradition to New York for trial. One of the grounds relied on was that he was insane at the time of the commission of the offense charged and therefore he could not be guilty of the crime. In disposing of this contention, the Court said (at p. 440):

> The inmates of lunatic asylums are largely governed, it has been remarked, by appeal to the same motives that govern other men, and it well might be that a man who was insane and dangerous, nevertheless in many directions understood the nature and quality of his acts as well, and was as open to be affected by the motives of the criminal law as anybody else. How far such considerations shall be taken into account it is for the New York courts to decide, as it is for a New York jury to determine whether at the moment of the conspiracy Thaw was insane in such sense as they may be instructed would make the fact a defence.
> * * *

And in *Charlton* v. *Kelly*, 229 U.S. 447, 462:

> * * *. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defend-

> ing the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. * * *

The question has been directly raised in various of the Courts of Appeals, and the almost unanimous answer has been that the issue of insanity cannot be raised on habeas corpus. It is held that insanity at the time of the offense is a defense which must be raised before the trial court and, since it is not jurisdictional, the court's determination is not subject to collateral attack. Similarly, insanity at the time of trial must be asserted as a bar to trial, again a matter of fact for the trial court and not an issue which can be reexamined except on direct appeal. *Hahn* v. *United States*, 178 F. 2d 11 (C.A. 10); *McMahan* v. *Hunter*, 150 F. 2d 498 (C.A. 10); *Whitney* v. *Zerbst*, 62 F. 2d 970 (C.A. 10); *Srygley* v. *Sanford*, 148 F. 2d 264 (C.A. 5); *Fenton* v. *Aderhold*, 44 F. 2d 787 (C.A. 5); *Hall* v. *Johnston*, 86 F. 2d 820 (C.A. 9); *Myers* v. *Halligan*, 244 Fed. 420 (C.A. 9); but see *Ashley* v. *Pescor*, 147 F. 2d 318, 320 (C.A. 8); *Brewer* v. *Hunter*, 163 F. 2d 341 (C.A. 10); *Moss* v. *Hunter*, 167 F. 2d 683 (C.A. 10).

In the military courts it is clear from the Manual of Courts-Martial proceedings that insanity is not treated as a matter of jurisdiction. Paragraph 65 of the 1928 Manual which was in effect at the time of the trial states:

> COURTS-MARTIAL — PROCEDURE — PLEAS — *Plea to the jurisdiction*—This plea may be based on an absence of any of the conditions stated in 7. An objection to which a plea to the jurisdiction is applicable can not be waived and may be asserted at any time.

Paragraph 7 provides:

> The jurisdiction of a court-martial, i.e., its power to try and determine a case, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with law with respect to number and competency to sit on the court; and that the court thus constituted was invested by act of Congress with power to try the person and the offense charged.

Insanity clearly does not come within any of the categories of jurisdiction listed in the quoted paragraph. Thus, the military authorities, like the civil courts do not treat insanity as a jurisdictional issue.

The principal authority in favor of the power in a court to consider sanity on a petition for habeas corpus is *Ashley* v. *Pescor*, 147 F. 2d 318 (C.A.

8) [9] In that case the court, relying mainly on *Johnson* v. *Zerbst, supra,* held that with respect to a defendant previously adjudged insane and found to be still insane, a plea of guilty was in effect a nullity. Apparently no attempt had been made by the trial judge to ascertain whether he had the capacity to understand the nature and consequences of his plea. The present case is clearly distinguishable since the military authorities did have before them the question of the petitioner's sanity and did decide it adversely to him. To reexamine the question in the present setting would require a reconsideration and a correction of specific findings of the military authorities.[10] Cf. *Hiatt* v. *Brown,* 339 U. S. 103 at 110-111.

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[9] Petitioner also seeks to find support in *Forthoffer* v. *Swope,* 103 F. 2d 707 (C.A. 9) but an examination of that case discloses that the question of sanity was explored in the habeas corpus court in order to determine whether the defendant had been legally capable of waiving counsel. See also *Frame* v. *Hudspeth,* 109 F. 2d 356 (C.A. 10), reversed, 309 U.S. 632.

[10] When petitioner applied for a new trial under AW 53, the Judge Advocate General of the Army, in denying the petition stated: "I entertain no doubt that Whelchel was so far free from mental defect, disease, and derangement as to be able concerning the particular acts ~~charged both~~ to distinguish right from wrong and to adhere to the right, and that consequently he was mentally responsible for the offenses of which he was found guilty. Nor do I question accused's mental capacity either to understand the nature of the proceedings or intelligently to cooperate in his defense. The indication by Dr. Pellettieri that Whelchel may have committed the offenses during an epileptic episode appears entirely groundless. Counsel at the oral hearing stated that Whelchel had no history of epilepsy. This is confirmed by psychiatric examinations of Whelchel made periodically since the beginning of his confinement, which report essentially negative neuropsychiatric findings."

IV

There Is Before This Court No Error in the Court-Martial Procedure

The petitioner argues that habeas corpus should have been granted because of three separate and distinct errors in the court-martial proceedings:

(a) Failure to act properly upon the issue of insanity when it was raised;

(b) failure to include enlisted men on the court; and

(c) failure to designate a member of the Judge Advocate General's Department as the law member of the court-martial.

(a) There was no failure to follow the prescribed procedures of the Articles of War or the Manual of Courts-martial with respect to the treatment of the insanity issue. Petitioner argues that under par. 87 (b) of the Manual [11] the reviewing authorities should have ordered a psychiatric examination as requested by his counsel. Paragraph 87b of the Manual, which is set forth in full in the Appendix, *infra*, p. 39, requires the reviewing authority to take appropriate action where it appears from the record or otherwise that the accused may have been insane either at the time of the offense or at the time of trial. However, the facts are clear, that until April 25, 1945, defense counsel had not asserted that the accused was insane (R. 22), while the reviewing authority

[11] Petitioner refers to this as Article 87 (b) of the Articles of War, but he obviously means the above cited paragraph of the Manual.

had completed its review on April 19, 1945. (CM R. 129) Therefore, all that the reviewing authority had before it on the insanity issue was the report of the investigating officer, the report of the Division neuropsychiatrist, and the statement of the Commanding Officer bringing the charges, all of which stated that petitioner was sane. Clearly, there was no occasion for the reviewing authority to order a psychiatric examination under Section 87 (b) of the Manual.

Perhaps petitioner intended to apply his argument to the confirming authority which, under par. 88 of the Manual for Courts-martial, must "be guided by the principles and provisions of 87 as far as applicable". If the confirming authority had felt the situation warranted it could have ordered a second psychiatric examination. This authority did have before it the request of the defense counsel together with the attached letters. However, it was a question of judgment whether the facts warranted further examination, and the Staff Judge Advocate recommended confirmation. Since the ordering of a further examination was not mandatory, but was a question of judgment and discretion, and there appears to have been no abuse of the authority, the courts below were bound to refuse to review the judgment of the military authorities. Cf. *Hiatt* v. *Brown*, 339 U.S. 103; *Humphrey* v. *Smith*, 336 U.S. 695.

(b) Petitioner's assertion that he was deprived of his constitutional rights under the 5th and 9th Amendments to the Constitution because enlisted men were not included on the court is also without merit. Apparently the argument is essentially that he was deprived of due process since the court-martial was not so constituted as to grant him a fair trial. In determining what rights exist under military law, it is well established that these rights are essentially different from those obtaining in our civil courts. *Ex Parte Quirin,* 317 U.S. 1, 40; *Kahn* v. *Anderson,* 255 U.S. 1.

Historically, both before and since the adoption of the Constitution, courts-martial have uniformly been composed of officers. In Winthrop's *Military Law and Precedents, Second Edition,* Reprint 1920, at pages 931 *et seq.*, are collected the *British Articles of War 1765* which were in force at the beginning of the Revolutionary War; the *Articles of War of Massachusetts of 1775* (id. page 947); the *American Articles of War of 1776* (id. page 961); the *American Articles of War of 1806* (id. 976) as well as Articles of War of earlier and later dates. Under none of these statutes could enlisted men sit on courts-martial.

This very question was recently raised in *De War* v. *Hunter,* 170 F. 2d 993 (C.A. 10), certiorari denied, 337 U.S. 908. The court stated at p. 997:

> Appellant's contention that a court-martial constituted to try a private soldier, composed entirely of officers, violates the 6th Amend-

ment of the Constitution, in that it denies him a right to a trial before his peers or equals, is not well founded. The right of trial by jury guaranteed by the 6th Amendment to the Constitution of the United States is not applicable in a trial by military court-martial. Hence, decisions respecting the right to trial by one's peers in civil courts are inapplicable. A soldier is subject to military law and what constitutes due process in a trial by a military tribunal is gauged by the principles of military law enacted by the Congress, * * *.

Under the Revised Articles of War, a defendant may now request that enlisted men be included on the court-martial trying him. (AW 4, 10 U.S.C., Supp. III, 1475). But this was not the law at the time petitioner was tried and he was not deprived of any Constitutional right thereby.

(c) Finally, the court below was entirely justified in refusing to reconsider its judgment on the ground that the law member of the court-martial was not a member of the Judge Advocate General's Department as petitioner claims is required by AW 8.

Although petitioner made his motion for a rehearing before the Court of Appeals on the ground of newly discovered evidence, the record of the court-martial which was introduced in the District Court and a copy of which had been in the petitioner's hands since April of 1945 (CM R. 92) disclosed on its face that the law member was not selected from the Judge Advocate General's De-

partment. Thus, this issue, which had not been raised in the District Court nor before the Court of Appeals, was not in fact based on newly discovered evidence and the issue was not seasonably presented.

Without regard to whether the issue was properly before the Court of Appeals, a complete answer to petitioner's argument is that this Court has recently passed on whether failure to name the law member from the Judge Advocate General's Department is a basis for granting a writ of habeas corpus. This Court has decided that, in the absence of gross abuse of discretion, it is not. *Hiatt v. Brown*, 339 U.S. 103.[12]

If there was no abuse of discretion in the *Hiatt* case,[13] it is even more obvious that petitioner has no valid complaint in this case. He has made no showing whatsoever of the availability of a member of the Judge Advocate General's Department. In fact, the record itself indicates the non-availability of such an officer, since the entire panel from which the court was chosen did not include a single officer from that Department. (CM R. 96). Clearly, petitioner has not sustained his bur-

[12] The Court specifically left undecided the question of whether failure to follow AW 8 is a jurisdictional matter. 339 U. S. 103, 110. For a discussion of that issue we respectfully refer the Court to pp. 13-33 of Petitioner's brief in that case.

[13] In that case the assistant trial judge advocate was drawn from the Judge Advocate's Department, but this court held that the convening authority had discretion to determine whether or not such member was "available" to serve as the law member of the court.

den of proving an abuse of discretion. Petitioner's argument must be taken to mean that in all cases the Articles of War require that the law member be chosen from the Judge Advocate General's Department. This is clearly contrary to the language of the Article and to the decided cases dealing with it. *Hiatt v. Brown, supra; Henry v. Hodges,* 171 F. 2d 401 (C.A. 2), certiorari denied, 336 U.S. 968.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
JOHN F. DAVIS,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
Attorney.

OCTOBER 1950.

APPENDIX

1. *Statutes.*

The following provisions of the Articles of War in effect at the date of the court-martial proceedings are pertinent:

Article 4 (10 U.S.C. (1946 ed.) 1475).

Who may serve on courts martial. All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts martial for the trial of any persons who may lawfully be brought before such courts for trial. When appointing courts martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts martial in excess of the minority membership thereof. [June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 788.]

Article 8 (10 U.S.C. (1946 ed.) 1479).

General courts martial. * * *

The authority appointing a general court martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is

not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe. [June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 788.]

Article 92 (10 U.S.C. (1946 ed.) 1564).

Murder; rape. Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court martial may direct; but no person shall be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace. [June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 805.]

Article 93 (10 U.S.C. (1946 ed.) 1565).

Various crimes. Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court martial may direct. [June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 805.]

The following provision of the Articles of War as amended in 1948 and effective February 1, 1949, is pertinent.

Article 53 (10 U.S.C. (Supp. III) 1527).

Petition for new trial. Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the

proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States. [As amended July 26, 1947, c. 343, Title II, § 205 (a), 61 Stat. 501; June 24, 1948, c. 625, Title II, § 230, 62 Stat. 639.]

2. *Manual for Courts-Martial* (1928 ed.)

The following provisions of the Manual for Courts-Martial (1928 ed.) are pertinent:

7. COURTS-MARTIAL—JURISDICTION IN GENERAL—Source, nature, and requisites.— * * *

* * * * * *

The jurisdiction of a court-martial, i.e., its power to try and determine a case, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with law with respect to number and competency to sit on the court; and that the court thus constituted was invested by act of Congress with power to try the person and the offense charged.

35. COURTS - MARTIAL — PROCEDURE BEFORE TRIAL — Submission of and Action Upon Charges—*Investigation of charges; reference to staff judge advocate; suspected insanity.* * * *

* * * * * *

c. Suspected Insanity.—An appointing authority may, in his discretion, suspend action on the charges pending the consideration of the report of one or more medical officers, or the report of a board convened under AR 600-500 in a case where that regulation applies and it is practicable to convene such a board. The medical officers or board will be fully informed of the reasons for doubting the sanity of the accused and, in addition to other requirements, should ordinarily be required to include in the report a statement, in as non-technical language as practicable, of the mental condition of the accused both at the time of the offense and at the time of the examination. The appointing authority may, in his discretion, attach the report to the charges if referred for trial or forwarded.

63. COURTS-MARTIAL — PROCEDURE — Inquiry into Sanity of Accused.—The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense. For instance, the actions and demeanor of the accused as observed by the court or the bare assertion from a reliable source that the accused is believed to be insane may be a sufficient reason. It should

be remembered, however, that while a person who is insane to the extent indicated above should not be tried, nevertheless, until the contrary is shown, a person is presumed to be sane, and a mere assertion that a person is insane is not necessarily and of itself enough to impose any burden of inquiry on the court.

The request, suggestion, or motion that such an inquiry be had may be made by any one of the personnel of the court, prosecution, or defense. If such an inquiry is determined upon, priority will be given to the determination of the matter, and the inquiry should exhaust all reasonably available sources of information with respect to the mental condition of the accused. If it appears that such inquiry may be a long and expensive proceeding, or if the court desires to hear competent expert testimony, the court may adjourn and report the matter to the appointing authority with its recommendation in the premises. Such recommendation may include in a proper case a recommendation that the accused be examined as indicated in 35*c*, and that the officer or officers, or some of them, conducting the examination be made available as witnesses.

If the court finds that the accused is insane, the proceedings so far as had embodying the finding to that effect will be forwarded to the reviewing authority; otherwise the trial proceeds.

65. COURTS-MARTIAL — PROCEDURE — Pleas — *Plea to the jurisdiction.*—This plea may be based on an absence of any of the conditions

stated in 7. An objection to which a plea to the jurisdiction is applicable can not be waived and may be asserted at any time.

75. COURTS-MARTIAL — PROCEDURE — Introduction of Evidence.—*a. General duties, etc., of court.*—

* * * * *

If at any time before the court announces an acquittal or imposes a sentence it appears to the court for any reason that additional evidence with respect to the accused's mental responsibility for an offense charged should be obtained in the interest of justice, the court will call for such additional evidence. The court may adjourn pending action on a request made by it to proper authority that the accused be examined by one or more medical officers and that such officer or officers be made available as witnesses. See 35*c* (Suspected insanity) in this connection. A request, suggestion, or motion that additional evidence be called for by the court as contemplated herein may be made by any one of the personnel of the court, prosecution, or defense. The court may, in its discretion, give priority to evidence on such issue and may determine as an interlocutory question whether or not the accused was mentally responsible at the time of the commission of the alleged offense. See 78*a* (Reasonable doubt). If the court determines that the accused was not mentally responsible, it will forthwith enter a finding of not guilty as to the proper specification. Such priority should be given where the evidence on the matters set forth in the specification is voluminous or ex-

pensive to obtain and has little or no bearing on the issue of mental responsibility for such matters.

* * * * *

78. COURTS-MARTIAL—PROCEDURE — Findings. —a. *General—Basis of Findings.*— * * *

* * * * *

Reasonable Doubt. * * * Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right.

* * * * *

87. COURTS-MARTIAL — ACTION — Reviewing Authority — b. *Powers and Duties.—In General.*— * * *

* * * * *

The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial or of how it was determined if raised.

* * * * *

88. COURTS-MARTIAL—ACTION — Confirming Authority.—* * *

A confirming authority will be guided by the principles and provisions of 87 as far as applicable.

3. *Psychiatric Report*

HEADQUARTERS 89TH INFANTRY DIVISION

Office of the Surgeon

APO 89 US Army
25 March 1945

Subject: Psychiatric examination of Pvt Marton L. Whelchel, ASN 18038433, Co C, 602nd TD BN. Age 22 years. Four years in the Army.

To: Assistant Chief of Staff, G-1, 89th Infantry Division APO 89 US Army.

Present Complaint:

This soldier's version of his present difficulty is as follows: On the evening of 14 Mar 45 he was in the securities section and borrowed a thousand francs from a friend. With it he played poker until 2200 and then returned to his section. They were having a drinking party during the course of which he drank two-thirds of a bottle of white wine. The party broke up about midnight. "We all went to bed and fell to sleep and I didn't get up until the next morning. The next morning both girls picked me out but I never had anything to do with them. I believe I had seen her in town before and that is how she may have known me."

Family History:

Father died at the age of 35 from some unknown cause when soldier was four years old. Mother is 68 years old and has been married three times, her previous husband having died each time. She is considered a rather nervous woman and is an enthusiastic follower of the Holy Roller Church. He has three full sisters who are alive and well and four half-sisters who are also alive and well. There is one full brother who is in the Army somewhere in the ETO. Another brother was killed in the Pacific theatre and he has a half-brother at home who is a cripple. There is no family history of mental or nervous diseases but all members of the family, with the exception of the Mother, drink heavily.

Personal History:

Medical History: He had the usual childhood diseases and tho he denies any history of venereal disease, he was treated for a "strain" (urethral discharge), in 1944.

Social History: As a child he had no fits, convulsions, temper tantrums, or sleep walking and he doesn't recall being enuretic. He comes from the state of Texas and says he always enjoyed company and made friends easily. However, the only sport he ever indulged in was playing cards. He reached the sixth grade in school and quit at the age of twelve years after repeating a number of grades. He always found school rather difficult. He had been drinking rather heavily as far back as he can remember and even states that his father

started them off drinking beer as infants because he felt "it was healthy."

The soldier was married in 1941 at the age of 19 to a girl of 18. There were no children by the marriage. While he was at camp, his wife "just got to going with a sailor and wanted a divorce." This was granted on the grounds of cruelty. He was a chronic nail-biter and always mildly nervous. He started driving a truck for his brother-in-law at the age of 13 and kept this job until entering the Army.

Army Record:

In 1943 he was arrested for drinking, in the course of which he "whips some MP's and shut them in a back room of a tavern". For this he received 30 days of hard labor and was reduced from Pfc. to Private. The highest grade he ever held was a T/4 as a tank driver for one and one-half years. Early this month he just got tired of it and asked to be reduced to his present rank of private. He denies the use of any drugs and is not a member of any church.

Mental Examination:

Attitude and General Behavior: Although this soldier was superficially cooperative, one got the definite impression that much material was definitely being withheld. He revealed a low level of intelligence and his story was such that might have been concocted by an individual having a minimum of native shrewdness.

Stream of mental activity: His speech was guarded at times and tho coherent and relevant. lacked conviction.

Emotional reactions: He was tense and guarded throughout the interview. He fidgeted all the time. There was no discrepancy, however, between emotional expression and thought content.

Content of thought; mental trends: There was no evidence of dillusions, hallucinations, grandosity, or hypochondriacal trends. He was asked, in view of his own inadequate explanation, whether he thought someone was trying to frame him. He jumped at the opportunity to answer this question and said "Maybe the Germans were trying to get even with us for having been put out of their homes."

Orientation, mental grasp, and capacity: He is oriented for time, place, and person and both remote and recent memory are adequate. His school and general knowledge was poor. On the Wechsler-Bolleveau intelligence test he scored a mental age of 11 years and 5 months and an IQ of 71.

Insight and judgment: He constantly refused to alter his story in regard to his activities and felt as tho nothing could be proved against him. He admitted that the act of rape was a serious crime and deserved severe punishment.

Summary and Conclusions: Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information. He must be considered legally sane and his personality is in keeping with that of a borderline mental defective with psycopathic traits.

NATHAN P. SEGEL,
Captain, MC,
Div Neuropsychiatrist.

4. *Communication by Dr. Pellettieri*

MEDICAL DETACHMENT

602nd Tank Destroyer Bn.,

APO #403, U. S. Army

23 April 1945.

201-Whelchel, Marton L. 18038433, Pvt. 602nd T.D. Bn.

Subject: Information in regards to the reopening of the case of Private Marton L. Whelchel 18038433, Co. C, 602nd T D Bn.

To: Commanding General, 89th Infantry Division APO #89, U. S. Army.

Private Marton L. Whelchel's entire behavior on the night of the 14th of March, 1945 was that of an insane or drunken individual, surely not that of a sane or sober man. His complete amnesia of the night causes me to think he either was so drunk he did not know what he was doing or that he had an epileptic episode. True enough his past history in this battalion does not bring out any previous episode but this could very well have been his first one.

My observations of the man after he committed this crime revealed that he never spoke of it and went about unconcerned and firmly convinced of his own innocence. Attempts by fellow soldiers and guards to make him talk about his exploits always brought out a negative answer. I am convinced that his negative answers and self assurance that he was not in serious trouble were the result of his amnesia of the whole incident.

Questioning his officers I was told that he recently had become a very troublesome individual in the company. In one incident he fired a fifty caliber machine gun in a rear area installation and when asked why he did it, he said he did not know. At another time he went to his platoon Commander and asked to be reduced from grade Technician 4th Grade to Private. When asked why he said he felt he could not hold the rating because he was not sure of himself.

Putting these factors together plus the unbelievable evidence that he was sober cause me to conclude that the boy is not normal mentally and as such should be given the proper consideration.

(S.) NINO M. PELLETIERI,
(T.) NINO M. PELLETTIERI,
Capt. Medical Corps, Surgeon,
602nd T.D. Bn.

A true copy:
(Signed) FRANK LATNIK,
WOJG, USA.

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